Nurul Izzati bt Musa v Jabatan Perkhidmatan Awam Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–212–06 OF 2021
AHMAD KAMAL J
4 DECEMBER 2023

Civil Procedure — Judicial review ('JR') — Whether subject-matter amenable to JR — Participant was expelled from Diploma in Public Administration ('DPA') course at National Institute of Public Administration after being found guilty of fighting with course-mate — Whether decision to expel was not amenable to judicial review as it was based on participant's breach of terms and conditions of a private law contract — Whether applicant had cited wrong parties as respondents as they were not the makers of the impugned decisions — Whether reliefs sought by applicant in JR application were not available to her in law

The applicant was granted leave to apply for judicial review ('JR') of a decision allegedly made by the respondents to expel her from a Diploma in Public Administration ('DPA') programme at the National Institute of Public Administration ('INTAN') after she was found guilty of physically fighting with a course mate at INTAN's hostel. In her JR application, the applicant sought an order of certiorari to quash the decision to expel her and to not award her the DPA. She also sought an order of mandamus that the respondents award her with a Postgraduate Diploma in Public Management. The applicant had joined the DPA programme after signing a letter of offer containing the rules, regulations and terms and conditions of the programme. Following the physical altercation incident and an investigation into the same, the Disciplinary Board in charge of the DPA programme found the applicant guilty of breaching the programme's rules and regulations and she was given a warning and marks were deducted from the 'Personality (Commitment and Discipline)' component of her course which, in turn, resulted in her failing to meet the minimum requirement for that component and thus failing in the overall DPA programme. The applicant's appeal against the Disciplinary Board's decision and the INTAN Accreditation Committee's decision not to accredit her with a DPA met with failure. The applicant then applied for leave to file the JR application contending that the respondents' decisions were, inter alia, irrational and unreasonable because the Disciplinary Board and the respondents had, inter alia, not considered her defence properly and that the decision to expel her from the DPA programme and not award her the Diploma was extreme and out of proportion to her 'disciplinary offence'. The applicant also alleged that the investigation and disciplinary proceedings against her were fraught with procedural improprieties.

Held, dismissing the JR application:

(1) The applicant was not entitled to apply for judicial review since her dispute was a private law matter concerning a contract between her and the respondents. The proper remedy for the applicant was only damages and not a public law remedy. All the decisions that were taken against the applicant either by the Disciplinary Board or INTAN's Accreditation Committee, the MSCKPPA and the top management of the second respondent were based on the DPA Programme Rules, the Academic Rules and the terms and conditions in the applicant's letter of offer (see paras 21–22 & 26).

(2) The JR application was wrongly brought against the respondents as they were not the makers of the impugned decisions. The actual decision-makers were the DPA Programme Disciplinary Board of INTAN and the Jawatankuasa Persijilan INTAN. The JR application was therefore incompetent and had to be struck out on this ground alone (see paras 30–31 & 38).

(3) The court found that the Disciplinary Board had exercised its powers under r 28 of the DPA Programme Rules reasonably and with proper basis and justification and had considered all material facts, circumstances and evidence before coming to its decision. The severity or leniency of the punishment imposed was not within the purview of this court. INTAN's Accreditation Committee had also acted rationally and proportionately in accordance with the Academic Rules when it decided not to accredit the applicant's DPA as a result of her failing to achieve the minimum grade for the Personality Development Component (see paras 40, 47 & 51–53).

(4) The court did not find any procedural impropriety in the way the investigations and disciplinary proceedings against the applicant were carried out. The applicant was given the opportunity to be heard during the proceedings. There was no express provision in the DPA Programme Rules which imposed a duty on the respondents to give a reason for the impugned decisions (see paras 54–68).

(5) An application for an order of mandamus in a judicial review application must comply with the requirements of s 44 of the Specific Relief Act 1950. Reading the said provision and case law on the point, the applicant herein had failed to show not only that she had a legal right to have the act performed but that the right was so clear, specific and well-defined as to be free from any reasonable controversy. The applicant had also failed to show that there was any duty imposed on the respondents by law to review or reassess the applicant's scoring and progress in the DPA

Programme and to accredit her with the Diploma. Accordingly, the order of mandamus sought by the applicant could not be granted (see paras 73 & 76–78).

(6) The impugned decisions that were made against the applicant were not tainted with any error of law, irrationality, unreasonableness or procedural impropriety as to warrant the intervention of this court (see para 79).

[Bahasa Malaysia summary

Pemohon telah diberikan kebenaran untuk memohon semakan kehakiman ('SK') terhadap keputusan yang didakwa dibuat oleh responden untuk membuangnya daripada program Diploma Pentadbiran Awam ('DPA') di Institut Tadbiran Awam Negara ('INTAN') selepas dia didapati bersalah bergaduh secara fizikal dengan rakan kursus di asrama INTAN. Dalam permohonan JRnya, pemohon memohon perintah certiorari untuk membatalkan keputusan membuangnya dan tidak memberikan DPA kepadanya. Beliau juga memohon perintah mandamus supaya responden menganugerahkannya dengan Diploma Pasca Siswazah dalam Pengurusan Awam. Pemohon telah menyertai program DPA selepas menandatangani surat tawaran yang mengandungi undang-undang, peraturan serta terma dan syarat program. Berikutan insiden pertengkaran fizikal dan siasatan ke atas perkara yang sama, Lembaga Tatatertib yang bertanggungjawab ke atas program DPA mendapati pemohon bersalah kerana melanggar undang-undang dan peraturan program dan dia telah diberi amaran dan markah telah dipotong daripada 'Personaliti (Komitmen dan Disiplin)' komponen kursusnya yang seterusnya mengakibatkan dia gagal memenuhi keperluan minimum untuk komponen itu dan dengan itu gagal dalam keseluruhan program DPA. Rayuan pemohon terhadap keputusan Lembaga Tatatertib dan keputusan Jawatankuasa Akreditasi INTAN untuk tidak mentauliahkannya dengan DPA menemui kegagalan. Pemohon kemudiannya memohon kebenaran untuk memfailkan permohonan SK dengan alasan bahawa keputusan responden adalah, antara lain, tidak rasional dan tidak munasabah kerana Lembaga Tatatertib dan responden, antara lain, tidak mempertimbangkan pembelaannya dengan betul dan bahawa keputusan untuk membuangnya daripada program DPA dan tidak menganugerahkannya Diploma adalah melampau dan tidak berkadaran dengan 'kesalahan disiplin'nya. Pemohon juga mendakwa bahawa siasatan dan prosiding tatatertib terhadapnya penuh dengan ketidakwajaran prosedur.

Diputuskan, menolak permohonan SK:

(1) Pemohon tidak berhak untuk memohon semakan kehakiman kerana pertikaiannya adalah perkara undang-undang persendirian mengenai kontrak antara dia dan responden. Remedi yang sesuai untuk pemohon hanyalah ganti rugi dan bukan remedi undang-undang awam. Semua

keputusan yang diambil terhadap pemohon sama ada oleh lembaga tatatertib atau Jawatankuasa Akreditasi INTAN, MSCKPPA dan pengurusan tertinggi responden kedua adalah berdasarkan Peraturan Program DPA, Peraturan Akademik dan terma dan syarat dalam surat tawaran pemohon (lihat perenggan 21–22 & 26).

(2) Permohonan SK telah dibawa secara salah terhadap responden kerana mereka bukan pembuat keputusan yang dipertikaikan. Pembuat keputusan sebenar ialah Lembaga Tatatertib Program DPA INTAN dan Jawatankuasa Persijilan INTAN. Oleh itu, permohonan SK adalah tidak kompeten dan terpaksa dibatalkan atas alasan ini sahaja (lihat perenggan 30–31 & 38).

(3) Mahkamah mendapati bahawa Lembaga Tatatertib telah menjalankan kuasanya di bawah r 28 Peraturan Program DPA dengan munasabah dan dengan asas dan justifikasi yang wajar dan telah mempertimbangkan semua fakta material, keadaan dan bukti sebelum membuat keputusannya. Keseriusan atau kelonggaran hukuman yang dikenakan bukanlah dalam bidang kuasa mahkamah ini. Jawatankuasa Akreditasi INTAN juga telah bertindak secara rasional dan berkadar mengikut Peraturan Akademik apabila memutuskan untuk tidak mengakreditasi DPA pemohon akibat kegagalannya mencapai gred minimum bagi Komponen Pembangunan Personaliti (lihat perenggan 40, 47 & 51–53).

(4) Mahkamah tidak menemui sebarang ketidakwajaran prosedur dalam cara penyiasatan dan prosiding tatatertib terhadap pemohon dijalankan. Pemohon diberi peluang untuk didengari semasa prosiding. Tiada peruntukan nyata dalam Peraturan Program DPA yang mengenakan kewajipan ke atas responden untuk memberikan alasan bagi keputusan yang dipertikaikan (lihat perenggan 54–68).

(5) Permohonan untuk mendapatkan perintah mandamus dalam permohonan semakan kehakiman mesti mematuhi kehendak s 44 Akta Relief Spesifik 1950. Membaca peruntukan dan undang-undang kes tersebut mengenai perkara itu, pemohon di sini telah gagal untuk menunjukkan bukan sahaja bahawa dia mempunyai hak undang-undang untuk melakukan perbuatan itu tetapi hak itu begitu jelas, khusus dan ditakrifkan dengan baik supaya bebas daripada sebarang kontroversi yang munasabah. Pemohon juga telah gagal untuk menunjukkan bahawa terdapat apa-apa kewajipan yang dikenakan ke atas responden mengikut undang-undang untuk menyemak atau menilai semula pemarkahan dan kemajuan pemohon dalam Program DPA dan untuk mentauliahkan beliau dengan Diploma. Sehubungan itu, perintah mandamus yang diminta oleh pemohon tidak dapat diberikan (lihat perenggan 73 & 76–78).

(6) Keputusan yang dipertikaikan yang dibuat terhadap pemohon tidak

dicemari dengan sebarang kesilapan undang-undang, tidak rasional, tidak munasabah atau ketidakwajaran prosedur yang mewajarkan campur tangan mahkamah ini (lihat perenggan 79).]

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145; [2010] 1 MLRA 524; [2010] 5 CLJ 865, FC (refd)

Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal [2018] 2 MLJ 537; [2018] 3 MLRA 589; [2018] 2 CLJ 513; [2018] 2 MELR 337, FC (refd)

Ambiga a/p Sreenevasan v Ketua Pengarah Imigresen, Malaysia & Ors [2012] 1 MLJ 92; [2011] 9 MLRH 572; [2012] 7 CLJ 170, HC (refd)

Boey Oi Leng (t/a Indah Reka Construction & Trading) v Trans Resources Corporation Sdn Bhd [2001] MLJU 566; [2002] 1 CLJ 405; [2001] 4 MLRH 274, HC (refd)

Council of Civil Service Unions and others v Minister for the Civil Service [1985] AC 374, HL (refd)

Dato' Seri Dr Ahmad Zahid bin Hamidi, Menteri Dalam Negeri Kementerian Dalam Negeri & Ors v Soo Lina & Ors (for and on behalf of the Sarawak Society For People's Aspiration (SAPA)) [2018] 2 MLJ 738; [2018] 1 MLRA 683; [2018] 6 CLJ 285; [2018] 1 AMR 436, CA (refd)

Gana Muthusamy v LM Ong & Co [1998] 3 MLJ 341; [1998] 2 MLRA 208; [1998] 4 AMR 3391; [1998] 4 CLJ 878, CA (refd)

Ganda Oil Industries Sdn Bhd & Ors v Kuala Lumpur Commodity Exchange & Anor [1988] 1 MLJ 174; [1987] 1 MLRA 367; [1988] 1 CLJ 48, SC (folld)

Kelana Megah Development Sdn Bhd v Kerajaan Negeri Johor and another appeal [2016] MLJU 1649; [2017] 2 MLRA 452; [2016] 8 CLJ 804, CA (folld)

Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180b; [1972] 1 MLRH 497 (refd)

Majlis Peguam v Dato Sri Dr Muhammad Shafee Abdullah [2016] 5 MLJ 572; [2016] 6 MLRA 1; [2016] 8 CLJ 749; [2016] 5 AMR 705, FC (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1; [1999] 3 CLJ 65; [1999] 1 MLRA 336; [1999] 3 AMR 3529, FC (refd)

Minister of Labour, Malaysia v Sanjiv Oberoi & Anor [1990] 1 MLJ 112; [1989] 1 MLRA 278; [1990] 1 CLJ 200, SC (refd)

Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641; [2008] 5 CLJ 321; [2008] 1 MLRA 705, FC (refd)

Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153; [1998] 1 CLJ 405; [1997] 2 MLRA 146; [1997] 4 AMR 419, FC (refd)

Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah [2004] MLJU 760; [2004] 2 CLJ 777; [2004] 1 MLRA 387; [2008] 3 AMR 689, FC (refd)

Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72; [2002] 1 MLRA 511; [2002] 4 CLJ 105; [2002] 3 AMR 2817, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

R v Panel on Take-overs and Mergers, ex parte Datafin plc and another (Norton Opax plc and another intervening) [1987] 1 All ER 564, CA (refd)

Wang Choon Yin lwn Dato' Seri Hj Mustafar bin Hj Ali, Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No 1) dan lain-lain [2020] 5 MLJ 793; [2020] 7 CLJ 621; [2020] 4 MLRA 651, CA (refd)

YKK (M) Sdn Bhd v Pengarah Tanah dan Galian Johor [2021] 6 MLJ 496; [2021] 5 MLRA 476; [2021] 8 CLJ 179, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 Schedule, para 1
Rules of Court 2012 O 53, O 53 r 1(2)
Specific Relief Act 1950 s 44, Part 2, Chapter VIII

Hasrina Hakimi (with Farah Nazira Fadzil, Ng Kheng Fai and Norhafizah Shafardeen) (Hasrina Hakimi) for the applicant.
Kogilambigai a/p Muthusamy (Federal Counsel, Attorney General's Chambers) for the respondents.

Ahmad Kamal J:

INTRODUCTION

[1] The applicant filed an application for judicial review (encl 15) under O 53 of the Rules of Court 2012 ('the ROC').

[2] The applicant was granted leave to apply for judicial review against the respondents to seek the following reliefs:

(a) an order of certiorari to revoke the decision to remove the applicant from the Diploma in Public Administration program and decision to not award the applicant with Postgraduate Diploma in Public Management No 1/2020;

(b) an order of mandamus for a review and/or recheck of the applicant's scoring and progress in the Diploma in Public Administration Program and to award the applicant with a Postgraduate Diploma in Public Management;

(c) general damages;

(d) all other directions deemed necessary and incidental thereto; and

(e) costs.

[3] In gist, the applicant filed this judicial review to obtain reliefs in relation to the decision of the respondents to expel the applicant from the Postgraduate Diploma in Public Management ('DPA') No 1/2020 Program and not to accredit her with the DPA ('the impugned decision').

[4] After the hearing, I dismissed the applicant's judicial review application (encl 15). This judgment contains the full reasons for my decision.

BACKGROUND FACTS

[5] The background facts gathered from the cause papers, affidavit in support and submissions of the parties are largely undisputed and can be summarised as follows:

(a) the applicant had been offered enrolment into the DPA No 1/2020 Program as a participant on a full-time basis for ten months vide an offer letter dated 6 December 2019 (see: encl 6, exh NIM, pp 32–50);

(b) the letter of the offer had stipulated certain conditions which comprise of amongst others the following terms:

(i) the DPA participants are not allowed to delay registering for the DPA No 1/2020 Program and are required to follow all the prescribed modules successfully until the completion of the programme (see: encl 6, exh NIM1, p 36, [7.1]);

(ii) during the DPA Program, participants are required to abide by the conditions set out in the letter of offer and all Rules set by the National Institute of Public Administration (INTAN) (see: encl 6, exh NIM1, p 36, [7.2]);

(iii) the participants from time to time will be assessed with respect to four components which are as follows:

(1) personality (commitment and discipline) (*sahsiah-komitmen dan disiplin*);

(2) academic;

(3) health and physical fitness; and

(4) security screening (*Tapisan Keselamatan*).

(See: encl 6, exh NIM1, p 36, [7.2(a)–(d)]

(iv) failure by any participants to comply with any one or more of the rules or failure to achieve the minimum requirement of assessments would result

in the termination of the agreement and the participants will be expelled at any time from continuing with the DPA program (see: encl 6, exh NIM1, pp 36–37, [7.2]);

(v) notwithstanding, the conditions contained in the letter of offer, the participants are also subject to other conditions specified in the letter offering scholarship, agreements, rules of the DPA Program and other relevant documents (see: encl 6, exh NIM1, p 37, [7.5]);

(vi) amongst the established Rules that form part and parcel of the letter of offer are:

(A) Peraturan-Peraturan Program Diploma Pascasiswazah Pengurusan Awam (DPA) Institut Tadbiran Awam Negara (INTAN) ('DPA Program Rules'); and

(B) Peraturan Akademik Program Diploma Pascasiswazah Pengurusan Awam (DPA) Institut Tedbiran Awam Negara (INTAN) ('Academic Rules').

(See encl 6, exh NIM4, pp 61–101);

(c) the applicant indicated her agreement by signing the acceptance letter on 15 December 2019 (see: encl 19, exh DAS1, p 15) and thereafter the applicant entered into a scholarship agreement (see: encl 6, exh NIM1, pp 32–50);

(d) the applicant reported for admission to the DPA Program on 19 January 2020 (see: encl 19, p 5, [6(i)]);

(e) on 29 October 2020, Subkluster Pembangunan Modal Ihsan (SKPMI) received a verbal complaint from Nur Nazihah bt Kamarul Zafik, a participant in the DPA Program with respect

(f) to a physical altercation with the applicant at Melor Hostel, INTAN (see: encl 19, p 5, [6(j)]);

(g) following thereto, an internal investigation was conducted on 3 November 2020 and 4 November 2020 by SKPMI by examining the CCTV recordings and interviewing witnesses which comprised of participants of the DPA Program for the purpose of assisting in the investigation (see: encl 19, p 5, [6(k)]);

(h) based on the investigation, SKPMI found that there was strong evidence to support the complaint of a physical altercation between the applicant and Nur Nazihah bt Kamarul Zafik (see: encl 19, p 5, [6(l)]);

(i) the second respondent issued a show cause letter dated 4 November 2020 to the applicant and applicant was required to submit a written reply to the SKPMI within 1 working day or no later than 5 November 2020 (see: encl 6, exh NIM5, pp 104–105 and encl 19, pp 5–6, [6(m)]);

(j) the applicant submitted a written reply dated 5 November 2020 to SKPMI and confirmed that there was a physical altercation between the applicant and Nur Nazihah bt Kamarul Zafik (see: encl 6, exh NIM6, pp 108–109 and encl 19, p 6, [6(n)]);

(k) apart from the written reply, the applicant was also requested to attend a meeting session chaired by the Director of INTAN on 9 November 2020 to examine the charge against the applicant (see: encl 19, p 6, [6(o)]);

(l) after hearing the applicant in her defence and examining the statement of the witnesses in the investigation report dated 5 November 2020, the Disciplinary Board sitting on 19 November 2020 found that the applicant is guilty of violating rr 8(c), 9, 19(e) and 19(f)(vii) of the DPA Program Rules resulting in ten disciplinary marks being deducted from the applicant's mark for Personality (Commitment and Discipline) Component and was given a warning (see: encl 19, p 6, [6(p)]);

(m) thereafter, INTAN's Accreditation Committee in a meeting held on 10 November 2020 decided in accordance with r 23.1(b) of the Academic Rules not to accredit the applicant for a DPA. The decision was made as she had failed to achieve the minimum required of Grade B with respect to Personality Development Component resulting in the applicant failing the overall DPA Program. (see: encl 19, page 6, [6(q)]);

(n) the decision of the Disciplinary Board was communicated by way of a letter dated 13 November 2020 (see: encl 6, exh NIM7, pp 112–113);

(o) meanwhile, the INTAN's Accreditation Committee decision not to accredit the applicant was communicated by way of a letter dated 17 November 2020 (see: encl 6, exh NIM8, pp 116–117);

(p) the applicant submitted an appeal by way of a letter dated 19 November 2020, with respect to the impugned decisions (see: encl 6, exh NIM10, pp 123–124);

(q) by way of a letter dated 7 December 2020, the applicant was informed that the Mesyuarat Search Committee Ketua Pengarah Perkhidmatan Awam

(MSCKPPA) No 1/2020 had on 4 December 2020 rejected her appeal and upheld the decision of the INTAN's Accreditation Committee which was communicated by way of a letter dated 17 November 2020 (see: encl 6, exh NIM12, p 130);

(r) dissatisfied with the decision, the applicant proceeded to appeal to the Director General of Public Service by way of a letter dated 3 December 2020 (see: encl 6, exh NIM13, pp 133–136), to the Chief Secretary to the Government of Malaysia by way of a letter dated 2 February 2021 (see: encl 6, exh NIM14, pp 139–159) and the Prime Minister of Malaysia by way of a letter dated 2 February 2021 (see: encl 6, exh NIM15, pp 162–182);

(s) the applicant's appeal letter dated 2 February 2021 to the Chief Secretary to the Government of Malaysia was forwarded to second respondent's office; and

(t) following a meeting by the Top Management of the INTAN on 10 March 2021, the applicant was informed by way of a letter dated 11 March 2021 that:

(i) the Disciplinary Board's decision on 9 November 2020 and the INTAN's Accreditation Committee decision on 10 November 2020 not to accredit the applicant is final and does not require further review; and

(ii) the decision is in line with the decision by the Public Service Department communicated by way of a letter dated 7 December 2020 informing the applicant that her appeal had been rejected (see: encl 6, exh NIM16, pp 185–186).

[6] Hence, the present judicial review application by the applicant.

THE APPLICANT'S GROUND FOR THE JUDICIAL REVIEW

[7] In gist, the applicant's application herein is based on the following grounds:

(a) The respondents had committed an error of law in making the decisions in:

(i) concluding that the applicant had breached INTAN DPA Program Rules and INTAN Academic DPA Program Rules;

(ii) the applicant was subject to an unfair procedure;

(iii) that the applicant's oral and written representations in defending herself were not taken into account;

(iv) that the applicant ought to be informed of the reasons for the decisions which include the score/marks of the components in the

DPA Program to conclude that she had failed the entire DPA Program; and

(v) that the applicant ought to know the reasons for the decisions and be allowed to make written representations only thereafter.

(b) the respondents had failed to take into account the following:

(i) the oral and documentary evidence/representation by the applicant to the allegations made against her in the reply letter and during the Disciplinary Proceeding;

(ii) that the applicant was mistreated by Cadet Nur Nazihah;

(iii) that the DPA Program was the only way for the applicant to become a PTD Officer;

(iv) the relevance and impact of the decisions on the applicants' good name, credibility, career development and prospect/ambition to becoming a civil servant and/or a PTD Officer; and

(v) to account for the decisions which affect the civil service generally.

(c) the decisions were irrational and unreasonable as the respondents:

(i) failed to appreciate that the respondents contributed to the ambiguous situation where the confidence and integrity of the respondents are being questioned by the decisions;

(ii) failed to appreciate the reasons given by the applicant to defend herself before the Disciplinary Proceeding and that the allegations were generally minor, petty and rectifiable and in some cases incorrect and uninformed;

(iii) failed to make a correct decision when it had decided that there were breaches of the INTAN DPA Program Rules and the INTAN Academic DPA Program Rules by the applicant which were serious and justified the respondents' decisions;

(iv) failed to appreciate that the respondents had been given the opportunity to evaluate and analyse the evidential proof when the applicant responded with further supporting documents and represented through the oral representations and appeal letters; and

(v) the decisions are imbalanced and disproportionate to the applicant's conduct in view of all the circumstances that are within the respondents' knowledge.

(d) the respondents had subjected the applicant to an unfair procedure by the following:

(i) failed to retrieve a recorded statement from the applicant during the

investigation before coming to the decision to issue the show cause letter and thereafter to hold a Disciplinary Proceeding against the applicant;

(ii) failed to give prior notice to the applicant to attend the Disciplinary Proceeding;

(iii) failed to give prior notice to the applicant to call her witnesses to attend the Disciplinary Proceeding;

(iv) failed to inform the applicant that she would be afforded sufficient time to defend herself but instead informed her that she was given one minute at the start of the Disciplinary Proceeding to do so and which action is unreasonable and biased; and

(v) failed to give sufficient notice of the decisions before the Graduation Ceremony instead of three days prior.

THE LAW

[8] Judicial review is generally concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety.

[9] However, the law has now developed to allow a decision to be challenged on grounds of illegality and irrationality, which then permits the courts to scrutinise the decision not only for the process, but also for substance.

[10] It is settled law that the High Court will not interfere with a decision of the respondents unless it can be established that the decision is infected with errors of law.

[11] In the Federal Court case of *Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal* [2018] 2 MLJ 537; [2018] 3 MLRA 589; [2018] 2 CLJ 513; [2018] 2 MELR 337, the liberal approach on judicial review in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 has been re-emphasised as follows:

> [45] In the same appeal, Edgar Joseph Jr FCJ (Eusoff Chin in agreement) said that an award could be reviewed for substance as well as for process:
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> It is often said that judicial review is concerned not with the decision but the decision-making process (see eg *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions and others v Minister for the Civil*

Service [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.

But Lord Diplock's other grounds for impugning a decision susceptible to Judicial Review make it abundantly clear that *such a decision is also open a challenge on grounds of 'illegality' and 'irrationality' and in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance.*

In this context, it is useful to note how Lord Diplock (at pp 410–411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality and (iii) procedural impropriety. This is how he put it:

> *By 'illegality'* as a ground for Judicial Review, I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
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> By 'irrationality', I mean what can by now be succinctly referred to as '*Wednesday* unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14, or irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.
>
> I have described the third head as *'procedural impropriety'* rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decisions. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that the expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.
>
> Lord Diplock also mentioned *'proportionality'* as a possible fourth ground of review which called for development. (Emphasis added.)

[12] Further, the Court of Appeal in *Dato' Seri Dr Ahmad Zahid bin Hamidi, Menteri Dalam Negeri Kementerian Dalam Negeri & Ors v Soo Lina & Ors (for and on behalf of the Sarawak Society For People's Aspiration (SAPA))* [2018] 2 MLJ 738; [2018] 1 MLRA 683; [2018] 6 CLJ 285; [2018] 1 AMR 436 explained the test of reasonableness in a judicial review as follows:

> [39] The test of reasonableness has been the subject of many cases over the decades

in other Commonwealth jurisdictions. For example, in dealing with the circumstances under which the court could intervene to quash the decision of an administrative officer or tribunal on ground of unreasonableness or irrationality, Henchy J of the Irish Court in *The State (at the Prosecution of John Keegan and Eoin J Lysaght) v The Stardust Victims' Compensation Tribunal* [1986] IR 642 set a number of such circumstances in different terms. They are:

1. It is fundamentally at variance with reason and common sense;

2. It is indefensible for hearing in the teeth of plain reason and common sense; and

3. Because the court is satisfied that the decision-maker has breached his obligation whereby the 'must not flagrantly reject or disregard fundamental reason common sense in reaching his decision'.

[41] In *Meadows v Minister for Justice Equlity and Law Reform and others* [2010] IESC 3 Denham J in her dicta (ratio) set out the following test:

> This test includes the implied constitutional limitation of jurisdiction of all decision-making which affects rights and duties. Inter alia, the decision-maker should not disregard fundamental reason or common sense in reaching his or her decision. The constitutional limitation of jurisdiction arises inter alia from the duty of the courts to protect constitutional rights. When a decision-maker makes a decision which affects rights then, or reviewing the reasonableness of the decision; (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on or rational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective'.

[13] In addition, a decision that involves an error of law is subject to judicial review as explained by the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65; [1999] 1 MLRA 336; [1999] 3 AMR 3529, where it states:

> In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the 'not to be challenged, etc' kind, *judicial review will lie to impeach all errors of law made by an administrative body or tribunal and,* we would add, inferior courts. In the words of Lord Denning in *Pearlman v Harrow School* (ibid) at p 70, '*… no court or tribunal has any jurisdiction to make an error of law on which the decision in the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it'.* (Emphasis added.)

[14] Based on the foregoing passages, it is my view that to succeed in an application for judicial review, the applicant must show that the respondents had, among others:

(a) asked itself the wrong questions;

(b) considered irrelevant matters;

(c) failed to take relevant matters into consideration;

(d) failed to apply the proper principle(s) of law; and/or

(e) reached a decision that was so perverse that no reasonable tribunal under similar circumstances would have reached it.

THE DECISION OF THE COURT

Contractual relationship

[15] Having perused the cause papers, I am of the view that the decision of the respondents is governed by an agreement between the applicant and the respondents by an offer letter dated 6 December 2019.

[16] The applicant had agreed and signed the acceptance letter dated 15 December 2019.

[17] The principle that the contract of the Government falls under private contract law can be derived from the Court of Appeal case of *Kelana Megah Development Sdn Bhd v Kerajaan Negeri Johor and another appeal* [2016] MLJU 1649; [2017] 2 MLRA 452; [2016] 8 CLJ 804 as follows:

> [30] Before proceeding further, we wish to deal briefly with the difference between public law and private law rights. Public law, we apprehend, governs relationships between Governments or public authorities and subjects, where the authority concerned has power in matters that affect the rights of subjects such as the matter before us that is land acquisition. Additionally, public law also governs relationships that are of direct concern to society such as criminal law. In short, public law powers cannot be exercised by any private individual or entity. Private law on the other hand, deals with the relationships between private individuals or entities with which the State is not directly concerned, as in the relations between husband and wife, the law of contract and law of torts. *Governments and public authorities too can be subjected to private law as in cases where the government contracts with a private individual* or a corporation to enter into a transaction. Private law is the counterpart to public law. (Emphasis added.)

[18] Applying the principles of law and case law above to the facts in the present case, it is my view that this case falls within the contractual nature which is governed by private contract law and not governed by public law.

[19] Further, the test on whether an act, omission, conduct or decision ought to be the subject matter of private law as opposed to judicial review proceedings is based primarily on the source from which the act, omission, conduct or decision emanates.

[20] I find support for my view by referring to the then Supreme Court case of *Ganda Oil Industries Sdn Bhd & Ors v Kuala Lumpur Commodity Exchange & Anor* [1988] 1 MLJ 174; [1987] 1 MLRA 367; [1988] 1 CLJ 48 where it referred to the decision of *R v Panel on Take-overs and Mergers, ex parte Datafin plc and another (Norton Opax plc and another intervening)* [1987] 1 All ER 564 wherein Lloyd LJ said:

> Of course, the source of the power will often, perhaps usually, be decisive. *If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review*: see *R v Disputes Committee of the National Joint Council for the Craft of Dental Technicians, ex p Neate* [1953] 1 All ER 327; [1953] 1 QB 704). (Emphasis added.)

[21] In the instant case, the decisions made by the respondents are as follows:

(a) the Disciplinary Board's decision on 19 November 2020 which found the applicant guilty of violating rr 8(c), 9, 19(e) and 19(f)(vii) of the DPA Program Rules and as punishment imposed a deduction of ten disciplinary marks under the Personality (Commitment and Discipline) Component and a warning to the applicant as stated in the letter dated 13 November 2020 (see: encl 6, exh NIM7, pp 112–113);

(b) the decision of the INTAN's Accreditation Committee on 10 November 2020 not to accredit the applicant's DPA as a result of failing to achieve the minimum Grade B for the Personality Development Component and failing the overall DPA communicated by a letter dated 17 November 2020 (see: encl 6, exh NIM8, pp 116–117);

(c) the decision during the Mesyuarat Search Committee Ketua Pengarah Perkhidmatan Awam (MSCKPPA) No 1/2020 on 4 December 2020 which rejected the applicant's appeal and upheld the decision of the INTAN's Accreditation Committee communicated by way of a letter dated 17 November 2020 (see: encl 6, exh NIM12, p 130); and

(d) the decision of the Top Management of the second respondent on 10 March 2021, which informed the applicant by way of a letter dated 11 March 3021 that the Disciplinary Board's decision on 9 November 2020 and the INTAN's Accreditation Committee decision on 10 November 2020 not to accredit the applicant is final and does not require further review (see: encl 6, exh NIM16, pp 185–186);

[22] The power to make all of these decisions mentioned above is derived from the DPA Program Rules, Academic Rules and condition of the offer letter which form part and parcel of the agreement by virtue of para 7.5 of the offer letter dated 6 December 2019 as follows:

A 7.5 Walau apa pun syarat yang terkandung dalam surat tawaran ini, *tuan/puan adalah tertakluk kepada syarat-syarat lain* yang terkandung dalam surat tawaran biasiswa, dokumen perjanjian, peraturan-peraturan Program DPA INTAN dan dokumen-dokumen lain yang berkaitan. (Emphasis added.)

B **[23]** I find that:

(a) the Disciplinary Board in arriving at the decision on 9 November 2020, was satisfied that there was a violation of the DPA Program Rules committed by the applicant. The Disciplinary Board exercised its power C under rule 28 of the DPA Program Rules, punished by deducting ten discipline marks under the component of personality assessment and a warning (see: DPA Program Rules in Part A — encl 6, exh NIM4, pp 15–16);

D (b) the decision of the INTAN's Accreditation Committee during the INTAN's Accreditation Committee meeting (Mesyuarat Jawatankuasa Pensijilan INTAN) on 10 November 2020 is pursuant to r 23.1(b) of the Academic Rules (see: p 14 of Academic Rules in Part B — encl 6, exh NIM4, p 99 and letter of offer dated 6 December 2019 — encl 6, E exh NIM1, pp 32–38);

(c) the decision during the Mesyuarat Search Committee Ketua Pengarah Perkhidmatan Awam (MSCKPPA) No 1/2020 on 4 December 2020 which rejected the applicant's appeal and upheld the decision of the INTAN's Accreditation Committee communicated by way of a letter F dated 17 November 2020 is provided for in rr 36–39 of the DPA Program Rules (see: DPA Program Rules in Part A — encl 6, exh NIM4, pp 82–83); and

(d) meanwhile, the decision of the Top Management of the second G respondent on 10 March 2021, which informed the applicant by way of a letter dated 11 March 2021 that the Disciplinary Board's decision on 9 November 2020 and the INTAN's Accreditation Committee decision on 10 November 2020 not to accredit the applicant is final and does not require further review is a reiteration of the earlier impugned decision (as H there is no avenue for further appeal provided to the applicant under the DPA Program Rules after the decision is made by MSCKPPA).

[24] It is evident from the above that the respondents' decisions fall within the realm of private contract law and not public law, therefore I am of the view I that the respondent's decisions are not amenable to judicial review and hence the applicant's judicial review ought to be dismissed.

[25] In *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; [2010] 1 MLRA 524; [2010] 5 CLJ

865, the Federal Court held:

> [21] In view of this, let us begin by first asking ourselves a preliminary question: is the appellant's complaint or grievance amenable for judicial review (before even considering whether the procedure adopted by him is appropriate)? If his complaint is not amenable for judicial review then there is no dispute as to the procedure adopted since he is at liberty to commence his action by way of writ or originating summons. So first we have to determine the parameters of matters which are amenable for judicial review.
>
> [22] It is widely accepted that not every decision made by an authoritative body is suitable for judicial review. *To qualify there must be a sufficient public law element in the decision made. For this, it is necessary to examine both the source of the power and the nature of the decision made; whether the decision was made under a statutory power* (see para 61 *Halsbury Laws of England* (4th Ed, 2001) Reissue, Vol 1(1)). To illustrate this, we will refer to a number of authorities involving dismissal from service by a public authority ...
>
> [24] So based largely on the fact that the respondent was given the right to enter into a contract of employment with the applicant, which includes the right of dismissal, the Court of Appeal found no public law element in the applicant's complaint to entitle him to the administrative remedies sought in the judicial review.
>
> [34] From the persuasive authorities above, we observed that for the appellant to be amenable for judicial review *there must be the presence of an element of public law* necessary to attract remedies of administrative law.
>
> [61] We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, *it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim of infringement is based solely on substantive principles of public law then the appropriate process should be by way of O 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under O 53 of the RHC must be adopted. Otherwise it may be set aside on ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O 53 of the RHC is not suitable.* Aside from this, there could be other circumstances like the kind in YAB Dato' Dr Zambry. Much depends on the facts of the case. *But generally, the court should be circumspect in allowing a matter which should be by way of O 53 of the RHC to proceed in another form. To say that it is opened to any applicant seeking judicial review to elect any mode he prefers*, as implied in Kuching Waterfront, *would, in our considered opinion, be rendering O 53 of the RHC redundant.* This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose of this rule is in the interest of good administration then this rule must be adhered to except in the limited and exceptional circumstances discussed.

(See also *YKK (M) Sdn Bhd v Pengarah Tanah dan Galian Johor* [2021] 6 MLJ 496; [2021] 5 MLRA 476; [2021] 8 CLJ 179.)

[26] Thus, based on the above, it is my view that the applicant is not entitled to apply for judicial review since the alleged dispute is in the realm of private

law involving a contract between the applicant and the respondents. Being a private law matter, judicial review is not appropriate and the proper remedy for the applicant is only damages and not a public law remedy.

The respondents should not be named in the judicial review application

[27] It is the submission of the respondents that the impugned decisions were not made by the respondents but by Lembaga Disiplin Program DPA INTAN and Jawatankuasa Persijilan INTAN.

[28] The respondents further submit that Lembaga Disiplin Program DPA INTAN and Jawatankuasa Persijilan INTAN should have been made a party to this application. Therefore, it is submitted that there was a fatal error by not naming the decision maker itself namely Lembaga Disiplin Program DPA INTAN and Jawatankuasa Persijilan INTAN. Accordingly, this application is incompetent and should be struck out.

[29] The identity of the decision maker of the impugned decision has been reflected in the letter informing the impugned decision as follows:

(a) the deduction of ten discipline marks under the personality assessment component and a warning was imposed by the Disciplinary Board (Lembaga Disiplin Program DPA INTAN) as evidenced from the letter dated 13 November 2020 (see: encl 6, exh NIM7, pp 112–113);

(b) the decision of the INTAN's Accreditation Committee meeting on 10 November 2020 not to accredit the applicant for DPA as communicated by way of a letter dated 17 November 2020 (see: encl 6, exh NIM8, pp 116–117); and

(c) the decision during the Mesyuarat Search Committee Ketua Pengarah Perkhidmatan Awam (MSCKPPA) No 1/2020 on 4 December 2020 which rejected the applicant's appeal and upheld the decision of the INTAN's Accreditation Committee communicated by way of a letter dated 17 November 2020 is provided for in rr 36–39 of the DPA Program Rules (see: encl 6, exh NIM16, pp 185–186).

[30] Having perused the cause papers, namely in the respondent's affidavit in encl 19, page 6, para 6(p), encl 19, pp 4–5 paras 6(e) and (f), encl 19, para 24(d) pp 9–10, it was clearly stated that it was the Lembaga Disiplin Program DPA INTAN and Jawatankuasa Persijilan INTAN that made the impugned decision and not the first and second respondents.

[31] Based on the above, I am of the opinion that the application was brought against the wrong party as the respondents named in this application was not the decision maker of the impugned decision.

[32] Furthermore, I am of the view that the applicant must correctly identify the party responsible for the decision in the exercise of the public duty or function which he alleged had adversely affected him.

[33] In the case of *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374 at p 408, Lord Diplock held that:

> The subject matter of every judicial review is a decision made by some person or (body of persons) whom I shall call the decision maker or else a refusal by him to make a decision.

[34] In the case of *Ambiga a/p Sreenevasan v Ketua Pengarah Imigresen, Malaysia & Ors* [2012] 1 MLJ 92 at p 100; [2011] 9 MLRH 572; [2012] 7 CLJ 170, Rohana Yusuf J (as she then was) held as follows:

> [12] Thus, since the First respondent and Third respondent are not decision makers of the impugned decision, judicial review cannot lie against them. To put it differently, *there is no decision by the First and Second respondent that is before this court to review. On this ground, alone, the application ought to be struck out.*

[35] Further, the Federal Court in the case of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65; [1999] 1 MLRA 336; [1999] 3 AMR 3529 held that:

> It is right to say, at the risk or being trite, that administrative law is much concerned with the legality of procedures leading up to a decision and, of course, of the decision itself. *It is therefore a matter of the first importance to correctly identify the decision sought to be impugned.* Furthermore, when the date on which a decision is made is important, it may be necessary to know which of a series of acts constituted the effective decision for the purpose of the scheme in question. The same is true where statute allows an appeal to be brought from a decision. *Failure to observe these basic requirements could have fatal consequences* as the following authorities will serve to illustrate. (Emphasis added.)

[36] Meanwhile, in the case of *Wang Choon Yin lwn Dato' Seri Hj Mustafar bin Hj Ali, Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No 1) dan lain-lain* [2020] 5 MLJ 793; [2020] 7 CLJ 621; [2020] 4 MLRA 651 the Court of Appeal stressed that it would render the judicial review application for leave to become incompetent if the judicial review application is taken against an inaccurate decision or against an inaccurate public authority.

[37] In the case of *Boey Oi Leng (t/a Indah Reka Construction & Trading) v Trans Resources Corporation Sdn Bhd* [2001] MLJU 566; [2002] 1 CLJ 405; [2001] 4 MLRH 274, Low Hop Bing J (as he then was) held as follows:

> *A petition may be described as 'frivolous' or 'vexatious' where it is obviously unsustainable*

A eg, where the petition is res judicata, or *where the wrong party is being sued,* or without merit and unjustified: see Malaysia High Court Practice. (Emphasis added.)

B **[38]** Therefore, based on the above, I am of the view that the applicant's application for judicial review is incompetent and based on this ground alone ought to be struck out.

Whether the impugned decision is reasonable, rational and proportionate

C **[39]** The applicant argued that the respondent's action is unreasonable when it failed to take into consideration amongst others, reasons raised by the applicant in the written representation.

D **[40]** However, I find that the applicant's contention on this issue is without basis. I find that the Disciplinary Board had exercised the power conferred on it reasonably with a proper basis and justification after all material facts, pieces of evidence, witnesses and defence have been scrutinised properly before arriving at the impugned decision.

E **[41]** The Disciplinary Board was satisfied with the finding of the investigation that the applicant was involved in a verbal and physical altercation with Nur Nazihah bt Kamarul Zafik and decided that there was a violation of rr 8(c), 9, 19(e) and 19(f)(vii) of the DPA Program Rules which is as follows:

F *Peraturan 8: Tata kelakuan Peserta Program DPA*

Seseorang pelajar Program DPA tidak boleh —

G (c) berkelakuan dengan sedemikian cara sehingga memburukkan nama atau mencemarkan imej Program DPA, INTAN dan Perkhidmatan Awam;

Peraturan 9: Peserta Program DPA hendaklah menjaga tatakelakuan secara lisan/bukan lisan yang boleh mencemarkan imej Program DPA, INTAN atau Perkhidmatan Awam sama ada di dalam atau di luar kampus INTAN sepanjang tempoh program

H *Peraturan 19: Peraturan di Asrama*

Peserta Program DPA dikehendaki mematuhi peraturan di asrama seperti berikut:

I (e) *Hendaklah menjaga tata kelakuan* dan tidak mengganggu penghuni-penghuni lain dengan apa cara sekalipun;

(f) *Dilarang melakukan* perkara-perkara yang bertentangan dengan nilai agama, moral dan akhlak seperti berikut:

vii. *bertengkar dan bergaduh* (Emphasis added.)

[42] More importantly, the applicant had admitted to the physical altercation with Nur Nazihah bt Kamarul Zafik who is a co-participant and sought to give an explanation for her behaviour during the incident.

[43] Following thereto the Disciplinary Board imposed a punishment of deduction of ten disciplinary marks under the Personality (Commitment and Discipline) Component and a warning as punishment.

Proportionality

[44] It is a trite law that as a general rule, the court will not interfere in matters pertaining to professional discipline but leave matters to the disciplinary body of that profession.

[45] The Court of Appeal in *Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341; [1998] 2 MLRA 208; [1998] 4 AMR 3391; [1998] 4 CLJ 878 held as follows:

> *It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor.* Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise, it will be the court, and not the profession that will determine the yardstick of professional behaviour. *A court will be entitled to interfere only if what has been found by a disciplinary committee to be unprofessional conduct will not be considered to be such by the best thinking members of that profession.* (Emphasis added.)

[46] In *Majlis Peguam v Dato Sri Dr Muhammad Shafee Abdullah* [2016] 5 MLJ 572 at p 587; [2016] 6 MLRA 1; [2016] 8 CLJ 749; [2016] 5 AMR 705, the Federal Court held:

> [29] We were minded of the well settled principle that *as a general rule, the policy is not to interfere in matters of professional discipline, but to leave matters of discipline to the body entrusted by Parliament to regulate and discipline members of the profession. All that is required is that the disciplinary body acts fairly in carrying out its duties, and the hearing conducted thoroughly with due deliberation and understanding given to the facts of the complaint. Unless the disciplinary committee in the exercise of its powers can be shown to have erred in principle, or to have overlooked, misconceived, or disregarded some material matter of fact, or to have failed to act judicially, the court ought not interfere, except in the rarest of cases*. This principle has been applied consistently by our courts (see cases of *Re A solicitor (No 2)* [1923] 93 LJKB 761; *Re A Solicitor* [1969] 3 All ER 610; *Keith Sellar v Lee Kwang*; *Tennakoon v Lee Kwang* [1980] 2 MLJ 191; [1980] 1 MLRA 461; *Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341; [1998] 2 MLRA 208; *Merchant v Law Society of Saskatchewan* [2002] 8 WWR 214). However, based on the facts and circumstances surrounding this case we were of the view that the fact that the statements were laudatory in itself did not automatically lead to the conclusion that there had been publicity within the

meaning of the 2001 Rules. The statements must be read within the context of the entirety of the articles and surrounding circumstances. (Emphasis added.)

[47] Therefore, it is my view that the severity or leniency of the punishment imposed is not within the purview of this court.

[48] The Federal Court in the case of *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153; [1998] 1 CLJ 405; [1997] 2 MLRA 146; [1997] 4 AMR 419 had stated that the test to be adopted is not what the court thinks to be the appropriate penalty, but it is for the disciplinary tribunal to determine the seriousness of the misconduct of its members and to pass the appropriate punishment.

[49] Clearly, the applicant's verbal and physical altercation with Nur Nazihah bt Kamarul Zafik is a conduct unbecoming of a participant of the DPA Program who is a potential Administrative and Diplomatic Officer.

[50] Thus, this court is of the view that the power conferred on the Disciplinary Board under r 28 of the DPA Program Rules was exercised reasonably with proper basis and justification.

Rational

[51] The Disciplinary Board's decision had resulted in the applicant failing to achieve the minimum requirement of Grade B with respect to the Personality Development Component leading to the applicant failing the overall DPA.

[52] The Disciplinary Board's decision has led to the decision of the INTAN's Accreditation Committee on 10 November 2020 not to accredit the applicant's DPA as a result of failing to achieve the minimum Grade B for the Personality Development Component and failing the overall DPA communicated by a letter dated 17 November 2020 (see: encl 6, exh NIM8, pp 116–117).

[53] The decision of the INTAN's Accreditation Committee is rational and proportionate as it is in accordance with the Academic Rules which is exhibited (see: encl 6, exh NIM4, pp 61–101 at pp 95 and 99):

13. *Kedudukan Akademik*

13.1 *Pelajar perlu mencapai gred minimum B (PNG 3.00) bagi setiap modul yang dijalani.*

13.2 Pelajar juga perlu mencapai gred minimum lulus yang ditetapkan bagi purata markah untuk setiap Komponen akademik dan Komponen Pembangunan Sahsiah.

13.3 *Pelajar yang gagal mendapat gred minimum B (PNG 3.00) bagi setiap modul atau bagi purata markah untuk setiap Komponen Akademik dan Komponen Pembangunan Sahsiah dikira sebagai gagal keseluruhan program dan boleh ditamatkan daripada mengikuti program.*

Faktor-Faktor Penamatan Pelajar

22. Pelajar akan ditamatkan daripada mengikuti pengajian sekiranya:

(a) Gagal mencapai gred minimum B (PNG 3.00) bagi setiap modul atau bagi purata markah untuk setiap Komponen Akademik dan Komponen Pembangunan Sahsiah.

Whether the respondent's decision is in accordance with established provisions

[54] Perusing the chronology of facts in relation to the respondent's decision, I find the following event occurred:

29 October 2020	Subkluster Pembangunan Modal Insan (SKPMI) on 29 October 2020 received a verbal complaint from Nur Nazihah bt Kamarul Zafik with respect to the physical altercation between her and the applicant at Asrama Melor, INTAN (see: encl 19, p 5, [6(j)])
3 November 2020 to 4 November 2020	SKPMI conducted an internal investigation by examining CCTV recordings and called a few witnesses from amongst the participants of the DPA Program and prepared an investigation report (see: encl 19, page 5, [6(k) and (I)]) and (encl 19, pa 10, [25(a)])
4 November 2020	SKPMI has issued a show cause letter dated 4 November 2020 to the applicant and the applicant is required to submit a written reply to SKPMI within 1 working day or no later than 5 November 2020 (see: encl 19, pp 5–6, [6(m)]) Show cause letter dated 4 November 2020 encl 6, exh NIM5, pp 104–105)
5 November 2020	The applicant has submitted a written reply to SKPMI confirming there was a physical altercation and provided her justification for the incident (see: encl 19, page 6, [6(n)]) Representation letter dated 4 November 2020 — encl 6, exh NIM5, pp 108–109)

6 November 2020	SKPMI has prepared a Minute to the Director of INTAN which contains the investigation report of the applicant's case and several matters were proposed to the Director of INTAN including the instruction to exempt certain regulations under the DPA Program Rules as the DPA Program is nearing its end and. The Director of INTAN agreed (see: encl 19, p 10, [25(b)])
9 November 2020	Apart from the written reply, the applicant was also called to provide an explanation with respect to the show cause letter (see: encl 19, p 6, [6(o)])
9 November 2020	After the proceedings, the Disciplinary Board decided that the applicant is guilty of violating rr 8(c), 9, 19 (e) and 19(f)(vii) of the DPA Program Rules and is punishable by deduction of ten discipline marks under the component of personality assessment and a warning (see: encl 19, p 6, [6(p)])
10 November 2020	INTAN's Accreditation Committee during its meeting decided that pursuant to r 22 of Academic Rules the applicant will not be awarded the DPA for failure to achieve the minimum Grade B for the Personality Development Component (see: encl 19, p 6, [6(q)])
11 November 2020	Search Committee Meeting held by the Director General of Public Service held that the applicant had failed to meet the conditions of appointment to the PTD Service Scheme (See: encl 6, exh NIM8, pp 116–117, [3])
13 November 2020	Decision of the Disciplinary Board has been delivered to the applicant via letter dated 13 November 2020. (See: encl 6, exh NIM7, pp 112–113)
17 November 2020	Decision of the INTAN's Accreditation Committee not to accredit the applicant's DPA has been delivered to the applicant via a letter dated 17 November 2020. (See: encl 6, exh NIM8', pp 116–117)

[55] Based on the above chronology, it is my view that the proceedings have been conducted based on r 26 of the DPA Program Rules.

(See: pp 13–14 of DPA Program Rules; encl 6 exh NIM4 pp 61–101 at pp 78–79.)

Charge sheet

[56] The applicant further argued that the decision made by the respondents

is unreasonable as there is no charge sheet issued to the applicant as per r 26 of DPA Program Rules and thus the applicant has been denied the right to represent herself.

[57] Even though there is no charge sheet issued by the respondents to the applicant as required under r 26(f) of the DPA Program Rules. I find that the applicant already knew about the charges based on the show cause letter dated 4 November 2020.

[58] Having perused the said show cause letter dated 4 November 2020, I find that the show cause letter conveyed with sufficient clarity and certainty the contemplated charges against the applicant and invited her to furnish the respondents with a written statement which was furnished in great detail.

[59] This can be gleaned from the content of the show cause letter dated 4 November 2020 which states as follows:

> 2. Adalah dimaklumkan bahawa satu laporan telah diterima oleh Sub Kluster Pembangunan Modal Insan, Institut Tadbiran Awam Negara (INTAN) yang menyatakan bahawa puan, *pada 2 Oktober 2020 (Jumaat), sekitar pukul 1.00 hingga 2.00 pagi, puan telah didakwa bertengkar dan memukul peserta bernama Nur Nazihah Binti Kamarul Zafik (Sidang 3) di Kawasan Asrama Melor, INTAN Bukit Kiara.*
>
> 3. Berdasarkan siasatan yang dilakukan oleh Sub Kluster Pembangunan Modal Insan (SKPMI), INTAN dan menimbangkan segala maklumat yang diterima, *puan disyaki telah bertengkar dan bergaduh di kawasan premis INTAN dan perbuatan tersebut boleh ditafsirkan melanggar peraturan 8(c), peraturan 9, peraturan 19(c) dan (f)(vii) di bawah Peraturan Program Diploma Pascasiswazah Pengurusan Awam (DPA) INTAN iaitu:*

[60] Added to that, I find that the respondents had exercised their discretionary power under r 40 of the DPA Program Rules to exempt the application of r 26(d) to 26(i) of the DPA Program Rules when conducting the proceedings towards the applicant. Through the exemption, the respondents may skip the procedure to give the charge sheet and request the applicant to provide the representation.

[61] Rule 40 of the DPA Program Rules states that:

> 40(1) Pengurusan Tertinggi INTAN menpunyai kuasa untuk memberi apa-apa pengecualian yang difikirkan sesuai daripada keperluan-keperluan Peraturan ini.

[62] In the instant case, I find that the applicant was given the opportunity of being heard during the proceedings which were held on 9 November 2020. The proceedings did not simply discuss about the applicant's family

A background but also the representation made by the applicant. This had been mentioned in para 27 of the first and second respondent's affidavit in reply affirmed on 13 October 2021 (encl 35).

B **[63]** Based on encl 33 which is the applicant's affidavit reply exhibiting a transcript of the Disciplinary Board's proceeding on 9 November 2020 prepared by the applicant based on a recording done by her establishes that the entire meeting lasted at least 30 minutes between (4.45–5.15pm) where the applicant was given ample opportunity to explain the incident and provide her justification (see: encl 33, exh NIM20, pp 12–29).

C

[64] Therefore, the applicant's contention that she was merely given a minute to provide her defence during the meeting on 9 November 2020 cannot be true (see: encl 6, p 12, [22] and pp 17–18, [44]).

D

[65] In any event, upon perusal of the cause papers, I am of the considered view that sufficient right to be heard had been given to the applicant in two stages before the punishment had been meted out. The applicant was entitled to two chances to defense herself, one in a written reply to the show cause letter

E dated 4 November 2020 and another one during the proceedings which were held on 9 November 2020. Thus, I view that the decision made by the respondents does not taint with irrationality as the issue of no right to be heard is a non-starter.

F

[66] Therefore, I view that the disciplinary proceedings conducted by the respondents against the applicant are in accordance with the established procedure laid down in the DPA Program Rule, Academic Rule and within the discretion of the respondents.

G

Duty to give a reason

[67] Another issue raised by the applicant is that there has been a failure by the respondents to give reasons to the applicant in arriving at the impugned

H decision.

[68] However, I find that there is no express provision in the DPA Program Rules which imposes a duty on the part of the respondents to give a reason for the imposition of such punishment.

I

[69] I find support for my view by referring to the Federal Court case of *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah* [2004] MLJU 760; [2004] 2 CLJ 777; [2004] 1 MLRA 387; [2008] 3 AMR 689 as follows:

Reading the provisions of the 1970 Regulations in its entirety, *I see no requirement that entitles the respondent to be informed of the possibility of him being dismissed or reduced in rank in the event he is convicted of any of the charges preferred against him in either the show cause letter or prior to the start of the disciplinary enquiry. There is no provision imposing a similar obligation as that prescribed by reg 28(1) of the 1993 Regulations. Since the 1970 Regulations impose no duty on the first appellant to inform the respondent at the first opportunity of the likelihood of his dismissal or reduction in rank, the first appellant cannot be said to have deprived the respondent of any procedural fairness as there cannot be any breach of duty where none exists in law.* (Emphasis added.)

(See also: *Minister of Labour, Malaysia v Sanjiv Oberoi & Anor* [1990] 1 MLJ 112; [1989] 1 MLRA 278; [1990] 1 CLJ 200; and *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72; [2002] 1 MLRA 511; [2002] 4 CLJ 105; [2002] 3 AMR 2817.)

Mandamus

[70] One of the reliefs sought by the applicant is a mandamus order that a review and/or reassessment of the applicant's scoring and progress in the DPA Program is carried out and to accredit the applicant with the DPA Program.

(See: encl 30, p 4, [3(b)].)

[71] The Federal Court in *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641; [2008] 5 CLJ 321; [2008] 1 MLRA 705, held that an order of mandamus can be granted either:

(a) under s 44 of the Specific Relief Act 1950 ('the SRA'); or

(b) the additional powers of the High Court provided by para 1 of the Schedule to the Courts of Judicature Act 1964 ('the CJA').

[72] It is also to be noted that O 53 r 1(2) of the ROC provides that this order (O 53) is subject to the provisions of Chapter VIII of Part 2 of the SRA.

[73] Therefore, any application for an order of mandamus made by way of judicial review proceedings must comply with the requirement of s 44 of the SRA.

[74] Section 44 of the SRA reads as follows:

ENFORCEMENT OF PUBLIC DUTIES

44 Power to order public servants and others to do certain specific acts

(1) A Judge may make an order requiring any specific act to be done or forborne, by

any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:

Provided that —

(a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

(c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

(e) the remedy given by the order applied for will be complete.

(2) Nothing in this section shall be deemed to authorise a Judge —

(a) to make any order binding on the Yang di-Pertuan Agong;

(b) to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government; or

(c) to make any order which is otherwise expressly excluded by any law for the time being in force.

[75] In *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180b; [1972] 1 MLRH 497, Sharma J (as he then was) had outlined four prerequisites essential to the issue of an order under s 44 of the SRA or a mandamus:

(a) whether the applicant has a clear and specific legal right to the relief sought;

(b) whether there is a duty imposed by law on the respondents;

(c) whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondents; and

(d) whether the applicant has any remedy, other than by way of mandamus, for the enforcement of the right which has been denied to him.

[76] Based on the case, in order to issue the order of mandamus, the applicant must show not only that he has a legal right to have the act performed but that the right must be so clear, specific, and well defined as to be free from any reasonable controversy. The order cannot be issued when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the respondents. The failure to show the existence of any legal right to compel the performance of a legal duty cast upon the respondents will deny the order of mandamus.

[77] Another important hurdle that needs to be crossed by the applicant for an order of mandamus is to show that there is a duty imposed by law on the respondents. In the absence of such legal duty, the mandamus shall not lie against the respondents.

[78] Based on the above, I am of the considered view that there is no provision of law imposing an obligation or duty on the respondents to review and/or carry out a reassessment of the applicant's scoring and progress in the DPA Program and thereafter to accredit the applicant with the DPA Program.

CONCLUSION

[79] Premised on the aforesaid reasons, I am of the view that the grounds for the application are under the purview of private law and the decisions of the respondents are made in accordance with the established procedure and are not tainted with any error of law, irrationality, unreasonableness or procedural impropriety that warrant the intervention of the court.

[80] As such, the applicant's application for a judicial review (encl 15) is dismissed with costs of RM5,000 without the allocator fee.

Application for JR dismissed.

Reported by Ashok Kumar